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FILED

NO. 94207 3 JUN 12 1995

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

RANDY EGLIN,
Petitioner

VERSUS

UNITED GAS PIPELINE COMPANY, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CONNIE WELCOME-SADLER
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ATTORNEY FOR PETITIONER

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2600

QUESTIONS PRESENTED

1. Whether the District Court erred when it dismissed the petitioner's complaint with prejudice based on an inaccurate affidavit submitted in support of an application for in forma pauperis status.

2. Whether the District Court erred in failing to impose lesser sanctions which would have served the interest of justice for petitioner's failure to accurately complete an affidavit requesting in forma pauperis status.*

---

* The parties to the proceedings in the United States Fifth Circuit Court of Appeals were Randy Eglin, petitioner herein, United Gas Pipe Line Company, respondent herein, James T. Timble, Jr., United States District Judge Robert H. Shemwell, United States Clerk of Court-Western District of Louisiana, Alonzo P. Wilson, United States Magistrate Judge, Connie Welcome-Sadler, Attorney for Petitioner, Robert J. Young, Jr., Robert T. Meyers, Timothy J. Young and the attorneys working for the firm of YOUNG, RICHARD, THREAD & MYERS, attorneys for Respondent herein.

TABLE OF CONTENTS

Page

Questions Presented For Review i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Grounds For The Court 2

Statutory Provisions 2

Statement of Case 4

Reasons for Granting the Writ 6

Conclusion 11

Appendix

APPENDIX A- Opinion Below
Opinion of the United States Fifth Circuit Court of Appeals A-1

APPENDIX B- Related Decisions Below
Memorandum Ruling of the United States District Court of the Western District of Louisiana A-3

TABLE OF CONTENTS (continued)

Appendix (continued)

APPENDIX C- Order of the United States District Court for the Western District of Louisiana A-6

APPENDIX D- Application To Proceed In Forma Pauperis submitted by Randy Eglin on December 2, 1992 ..... A-7

TABLE OF AUTHORITIES

CASES: **PAGE**

Camp v. Oliver, 789 F. 2d 434 (11th Cir. 1986) 7

Carter v. Thomas, 527 F. 2d 1332 (5th Cir. 1976) 7

Dawson v. Lennon, 797 F. 2d 934 (11th Cir. 1986) 7

Harris v. Cuyler, 664 F. 2d 388 (3d Cir. 1981) 7

Lay v. Justices-Middle District Court, 811 F. 2d 285 (5th Cir. 1987) 8

Morris v. Ocean Systems, Inc., 730 F. 248 (5th Cir. 1984) 7

Rogers v. Kroger Co., 669 F. 2d 317 (5th Cir. 1988) . 8,10

Watson v. Ault, 525 F. 2d 886 (5th Cir. 1976) 7

IN THE SUPREME COURT OF THE UNITED STATES
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RANDY EGLIN,

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VERSUS

UNITED GAS PIPELINE COMPANY, ET AL.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Randy Eglin, your petitioner prays that a writ of certorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered on February 10, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported pursuant to Local Rule 47.5 but is reproduced in Appendix A attached hereto. The opinion of the United States District Court for the Western District of Louisiana is reproduced at Appendix B attached hereto. The order of the United States District Court for

the Western District of Louisiana is reproduced at Appendix C attached hereto.

JURISDICTIONAL GROUNDS FOR THIS WRIT

1. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254 (1).

2. The judgement of the United States Circuit Court of Appeals for the Fifth Circuit was entered on February 10, 1995.

3. The application for an extension of time within which to file a petition for a writ of certorari was presented to Justice Scalia who on May 10, 1995, extended the time to and including June 12, 1995.

STATUTORY PROVISIONS

28 U.S.C. § 1915 provides as follows:

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceedings, civil or criminal, or appeal therein, without prepayment of fees; and costs or security therefore, by a person who makes affidavit that he is unable to pay such costs or give the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expense of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636 (b) of this title or under section 3401 (b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the record on appellate court, in the case of proceedings conducted pursuant to section 636 (c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the Court shall issue and serve all process, and perform all duties such cases. Witness shall attend as other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegations of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgement may be rendered for costs at the conclusions of the suit or action as in other cases, but the United States shall not be liable for

any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record of the prevailing party, the same shall be taxed in favor of the United States."

STATEMENT OF THE CASE

The petitioner, RANDY EGLIN, on December 2, 1992, filed a pro se complaint for employment discrimination based on race pursuant to Title VII of the 1964 Civil Rights Act (as amended in 1972), against the respondent, UNITED GAS PIPELINE COMPANY. The complaint was accompanied by the petitioner's motions To Proceed In Forma Pauperis and for the Appointment of Counsel. The Clerk of Court for the Western District of Louisiana, signed an order granting the petitioner's Motion To Proceed in Forma Pauperis on December 2, 1992. However, the Motion for Appointment of counsel was denied by the Honorable Alonzo P. Wilson, United States Magistrate Judge on December 15, 1992.

An Order of Dismissal for Failure to Prosecute was signed by the Clerk of Court on March 23, 1993. The case was dismissed without prejudice allowing reinstatement within thirty (30) days for good cause shown.

On April 12, 1993, undersigned counsel filed a Motion To Enroll and a Motion to Reinstate. Orders granting both motions were signed by Judge James T. Trimble, Jr. and Magistrate Judge Alonzo P. Wilson on April 13, 1993. At the time of undersigned counsel's motions for enrollment and reinstatement, she also filed the first amended

Complaint which was entered into the record on April 13, 1993. The respondent answered the amended complaint on July 12, 1993.

The respondent filed a Motion for Summary Judgement with a support brief on April 14, 1994. A subsequent Motion for Leave To File a Supplemental Memorandum In Support of the Motion for Summary Judgement was submitted on April 15, 1994.

On April 26, 1994, the respondent filed a Motion To Traverse the IFP Status and/or To Dismiss the Complaint For Failure to list all financial holdings. On April 24, 1994, the court signed an order granting the respondent's Motion for Leave To File a Supplemental Memorandum in Support of the Motion for Summary Judgement.

The Honorable Judge James T. Trimble, Jr. signed an order on May 23, 1994 granting the respondent's request to extend the time to respond to the Motion to Traverse IFP Status and/or Dismiss and the Motion for Summary Judgement to June 8, 1994.

On June 8, 1994, the petitioner filed a responsive memorandum to the respondent's Motion To Traverse IFP Status and/or Dismiss and the Motion for Summary Judgement.

On June 14, 1994, the Court issued a ruling and order which granted dismissal of the petitioner's complaint with prejudice for failure to list all financial holdings. (see appendix B and C) A Notice of Appeal was filed by the petitioners on July 5, 1994.

On February 10, 1995, the United States Fifth Circuit Court of Appeals affirmed the decision of the lower court. (See Appendix A) The petitioner filed a Motion for Extension of Time to file to Writ of Certorari on May 8, 1995. On May 10, 1995 Associate Justice Scalia granted an extension allowing the petitioner to file a writ of Certiorari on or before June 12, 1995.

REASONS FOR GRANTING WRIT

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN AFFIRMING THE LOWER COURT'S DECISION DISMISSING THE PETITIONER'S COMPLAINT WITH PREJUDICE DUE TO AN INACCURATE AFFIDAVIT SUBMITTED IN SUPPORT OF AN IN FORMA PAUPERIS APPLICATION AND REQUIRES THIS COURT TO EXERCISE ITS SUPERVISORY POWERS.

28 U.S.C. § 1915 provides in pertinent part:

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such cost or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

(b) The court may request an attorney to

represent any such person unable to employ counsel and may dismiss the case if the allegations of poverty is untrue, or if satisfied that the action is frivolous or malicious."

It is generally well recognized that proceeding in forma pauperis is a privilege, not a right and permission to so proceed is committed to the sound discretion of the court. *Carter v. Thomas,* 527 F. 2d. 1332 (5th Cir. 1976); *Watson v. Ault,* 525 F. 2d. 886 (5th Cir. 1976).

Under the clear and unabmiguous wording of the statute, dismissal is not mandatory, but discretionary. The statue, however, is silent as to whether the dismissal should be with or without prejudice and legislative history is not enlightening *Camp v. Oliver,* 789 F. 2d. 434, 437 (11th Cir. 1986). The cases that have dealt with the appropriateness of a dismissal with prejudice under section 1915 (d) have uniformly recognized that such a dismissal is an extreme sanction and should only be imposed when sufficient evidence exists to support its application. *Camp* at 438; *Dawson v. Lennon,* 797 F. 2d. 934, 935 (11th Cir. 1936); *Harris v. Cuyler,* 664 F.2d. 388, 391 (3d Cir. 1981). This recognition is largely based on an analogy to the proper use of a dismissal with prejudice in other contexts, and as such, is consistent with the law in this circuit. *Morris v. Ocean Systems, Inc.* 730 F. 2d 248, 251 (5th Cir. 1984).

In *Morris,* the Fifth Circuit clearly defined the standard to be applied for determining whether a district court has abused its discretion when dismissing a claim. Specifically, the Fifth Circuit examined the appropriateness of a district court's involuntary dismissal of

an action pursuant to Fed. R. Civ. P. 41 (b). However, this same analogy has been determined to apply to dismissals with prejudice under 28 U.S.C. § 1915 (b). *Lay v. Justices-Middle District Court,* 811 F. 2d 285, 286 (5th Cir. 1987) Rule 41 (b) permits a district court to dismiss an action for failure to prosecute upon the motion to "achieve the orderly and expeditious disposition of cases." The Fifth Court reviewed the district court's judgement for an abuse of discretion by examining its prior decision rendered in *Rogers v. Kroger Co.,* 669 F. 2d 317, 320 (5th Cir. 1983). In *Rogers,* the Fifth Circuit meticiously detailed the appropriate legal standard for Rule 41 (b) dismissals with prejudice.

The *Rogers* court stated that a dismissal with prejudice would only be affirmed upon showing of (a) a clear record of delay or contumacious conduct by the plaintiff, and (b) where lesser sanctions would not serve the best interest of justice. *Rogers,* supra 669 F.2d at 320. The Fifth Circuit went further in noting that the significance in its decision of the presence of certain "aggravating factors", such as (1) the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, (2) the degree of actual prejudice to the defendant, and (3) whether the delay was the result of intentional conduct. *Id.*

In this context, the Rogers court explained:

> "The cases in this circuit in which dismissals with prejudice have been affirmed on appeal illustrate that such a sanction is reserved for the most egregious of cases, usually cases where the requisite factors of clear delay and

> ineffective lesser sanctions are bolstered by the presence of at least one aggravating factor."

Rogers, supra, 669 F. 2d. 320.

In accordance with the requirements of section 1915 (a), the petitioner submitted an affidavit of poverty with his petition to proceed *in forma pauperis* on December 12, 1992. The printed form furnished by the district court contained questions concerning the petitioner's financial status. (See Appendix D) In response to the question, "Do you have any cash or money in a checking or savings account", the petitioner answered *yes* and specifically cited the amount of $610.94. Based on this and other information contained in the application to proceed *in forma pauperis.* This application was completed by the petitioner in a pro se status.

On April 19, 1994, the petitioner, in deposition, acknowledged, that he had maintained bank accounts at both premier Bank and at Calcasieu Marine continously since 1991, in which he maintained a balance of at least $10,000.00 in each account.

The Fifth Circuit erred in failing to employ the *Rogers* standard in determining the appropriateness of the lower court's action of dismissal. The ruling of the Fifth Circuit only referenced a finding that the district court considered lesser sanctions and concluded that no lesser sanctions would adequately serve the district court's interest in protecting its integrity and the integrity of the privilege of proceeding *in forma pauperis.* Absolutely no application

was made of the *Rogers* standard in reaching this conclusion. Moreover, the Fifth Court did not find an abuse of discretion for the lower court failure to follow same.

The record in this cause is totally devoid of any evidence that would support a finding that the petitioner's actions resulted in any type of delay in processing this litigation or had any effect of undermining the action. A correct analysis by the Fifth Circuit would have further disclosed that there was no presence of any "aggravating factors" which would have justified a dismissal under the *Rogers* analysis. The Fifth Circuit, like the lower court, simply focused on the inconsistency of response without adequate reason, and, concluded that the petitioner acted in bad faith and his action should therefore, be dismissed.

Additionally, there is nothing in the district court's ruling nor the Fifth Circuit's decision indicating that less severe sanctions were considered and found to be futile or contrary to the interest of justice. Assessments of fines, costs, or damages against the petitioner, dismissal without prejudice, and explicit warnings are preliminary means or less server sanctions that may be used to safeguard the court's undoubted right to control its docket. *Rogers,* supra 669 F. 2d at 321. A clear record of delay completed with tried or futile lessor sanctions were considered in *Rogers* to justify a Rule 41 (b) dismissal with prejudice. Both of those elements are missing here.

In sum, the dismissal with prejudice was not justified by the record in this case. This case should be remanded to the district court allowing it to impose sanctions which are less severe than dismissal which terminates the petitioner's rights.

CONCLUSION

Based on the foregoing, the Fifth Court did not require nor did the lower court apply the appropriate standard for determining whether the petitioner's claims should be dismissed. Therefore, this Court's requested to invoke its supervising authority and remand this case to the lower court. Accordingly, petitioner respectfully prays that a writ of certorari should issue to review the ruling of the United States Court of Appeals for the Fifth Circuit.

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Lafayette, La. 70501
318-235-2093

ATTORNEY FOR PETITIONER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-40642

RANDY EGLIN,

Plaintiff-Appellant,

v.

UNITED GAS PIPE LINE CO., ET AL,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(92-CV-2158)

FILED
FEB 10 1995

Before KING, EMILIO M. GARZA and DeMOSS, Circuit Judges.

PER CURIAM:*

* Local Rule 47.5 provides: "the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

This court has held, in *Lay v. Justices-Middle Dist. Court*, 811 F.2d 285 (5th Cir. 1987), that a district court has the power to dismiss an action filed under 28 U.S.C. § 1915(d) with prejudice if the allegation of poverty is untrue. The question presented on appeal from such a dismissal is whether the district court abused its discretion in ordering such a harsh sanction for a false allegation of poverty. The record in this case makes clear that the district court considered lesser sanctions and concluded that no lesser sanction would adequately serve the district court's interest in protecting its integrity and the integrity of the privilege of proceeding *in forma pauperis*. We have reviewed that record and find no basis for concluding that the district court abused its discretion in dismissing the case with prejudice. The appellant had ample opportunity to show the district court that the misstatement of the amount that he had in a checking or savings account was inadvertent or the result of a misunderstanding. He failed to do so. The district court concluded that the misstatement was made in bad faith, and we cannot say that this finding is unsupported by the record. The judgment of the district court dismissing appellant's case with prejudice is, therefore, AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

RANDY EGLIN	C.A.NO.CV 92-2158LC
VS.	JUDGE TRIMBLE
UNITED GAS PIPE LINE COMPANY	MAGISTRATE JUDGE WILSON

FILED
JUN 14 1994

MEMORANDUM RULING

Presently before the court is a Motion to Traverse In Forma Pauperis Status and/or Alternatively, A Motion to Dismiss, in which the defendants move that the plaintiff's, Randy Eglin's, complaint be dismissed for failing to list all financial holdings.

This suit involves a complaint filed by Randy Eglin, in which he alleges that he was terminated as an employee at United Gas Pipe Line Company because of racial discrimination. Contemporaneously with the filing of his complaint, the plaintiff filed an application to proceed in forma pauperis stating that he had a total of $ 610.94 in savings or checking accounts.

EXHIBIT
11

In a deposition of the plaintiff taken Tuesday, April 19, 1994, the plaintiff acknowledged that he has maintained bank accounts at both Premier Bank and at Calcasieu Marine continuously since 1991, in which he maintained balanced of at least $ 10,000.00 in each account. (See deposition pp. 28-32).

28 U.S.C. §1915(d) authorizes a court to "dismiss [a] case if the allegation of poverty is untrue," but it does not specify whether the dismissal is to be with or without prejudice. Although dismissal with prejudice is a drastic sanction, such a sanction has been approved by the Third, Sixth, Eighth and Eleventh Circuits upon a showing of bad faith. *Harris v. Cuyler,* 664 F.2d 388 (3d Cir. 1981): *Thompson v. Carlson,* 705 F.2d 868, 869 (6th Cir. 1983) (per curiam); *Dawson v. Lennon,* 797 F.2d 934, 935 (11th Cir. 1986) (per curiam); *Romesburg v. Trickey,* 908 F.2d 258, 259 (8th Cir. 1990).

The Fifth Circuit in *Lay v. Justices-Middle District Court,* 811 F.2d 286 (5th Cir. 1986), held that dismissal with prejudice was inappropriate based upon the falsification of such an affidavit. The court in *Morris v. Ocean Systems, Inc.,* 730 F.2d 248, 251 (5th Cir. 1984) held that dismissal with prejudice is a "drastic remedy to be used only in those situations where a lesser sanction would not better serve the interests of justice" (quoting *Burden v. Yates,* 644 F.2d 503, 505 (5th Cir. 1981)).

This case can easily be distinguished from *Lay.* In *Lay,* the plaintiff forged the signature verifying the amount in his prison account. Although this was dishonest, the court noted that it did not change the fact that the

plaintiff remained indigent. In the case at bar, however, the plaintiff filed his petition under penalty of perjury stating that he had approximately $610.00, when in truth and fact he had over $ 20,000.00 sitting in two bank accounts. Bad faith is patent on the face of this application.

The Fifth Circuit stated in *Morris* that dismissal with prejudice is not appropriate when a lesser sanction would better serve the interests of justice, but there are no such lesser sanctions appropriate in this case. The interests of justice are best served by this court demanding that truth, the cornerstone of our justice system, be fundamental to the right to seek judicial redress of alleged wrongs. Based upon a foundation of blatant falsehood, this action must be dismissed with prejudice.

Lake Charles, Louisiana, this 14th day of June, 1984.

/s/ James T. Trimble

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT COURT

COPY SENT
DATE 6-16-94
BY SM
TO Welcome-
Sadler Young

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

RANDY EGLIN	C.A.NO.CV 92-2158LC
VS.	JUDGE TRIMBLE
UNITED GAS PIPE LINE COMPANY	MAGISTRATE JUDGE WILSON

FILED
JUN 14 1994

ORDER

For the reasons set forth in the corresponding Memorandum Ruling,

IT IS ORDERED that the defendant's motion to dismiss is GRANTED and the plaintiff's complaint be and is herein DISMISSED WITH PREJUDICE.

Lake Charles, Louisiana, this 14th day of June, 1994.

/s/ James T Trimble

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT COURT

JUDGEMENT ENTERED 6-16-94
BY Susanne Mitchell
COPY TO Welcome-Sadler Young

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

FILED
DEC 2, 1992

RANDY EGLIN
Plaintiff

versus

Civil Action No.CV-92-2158

UNITED GAS PIPE LINE CO.
Defendant

JUDGE TRIMBLE
Judge

Mag.Judge

APPLICATION TO PROCEED IN FORMA PAUPERIS UNDER SECTION 706(f) OF CIVIL RIGHTS ACT OF 1964

1. FULL NAME RANDY EGLIN

2. ADDRESS Rt. 2 Box 1102
(Street Address or P. O. Box)
WEST LAKE (City) LA. (State) 70669 (Zip Code)

3. MARITAL STATUS: Single ✓
Married ___ Separated ___
Divorced ___ Widowed ___

4. If you are married and if your spouse is employed, state his/her name, occupation, employer, address of employer and salary.

(Name of spouse) (Occupation) (Salary)

(Name and Address of Spouse's Employer)

5. Are you presently employed? Yes____ No ✓
If the answer is "yes", give your occupation, the name and address of your employer and the gross and net amount of your salary.

(Occupation) (Gross Salary) (Net Salary)

(Name and Address of your Employer)

6. If you are not presently employed, state the date of your last employment, the name and address of your employer and your salary.

11-4-91 2,000 mo.

(Date last employed) (salary)

UNITED GAS PIPE LINE CO.

(Name and Address of last Employer)

7. Do you receive income from any of the following sources?

   A. Workman's Compensation? Yes____ No✔
      If "yes", please list monthly amount $_____
   B. Rent payments, interest or dividens?
      Yes ✔ No____
   C. Pensions, Annuities or life insurance payments?
      Yes____ No ✔
   D. Gifts or inheritance? Yes____ No ✔
   E. Other sources? Yes____ No ✔
      If "yes", please list sources and amount received.

      _____
      _____
      _____
      _____

8. Do you have any cash or monney in a checking or savings account? Yes ✔, $ 610.94 No____

9. Do you own or have interest in any real estate, automobiles or other vehicles, boats, stocks, bonds, notes, or any other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ✔ No____
   If "yes", give a description of the property and its estimated value.

   I own two automobiles; Pontiac Bonneville & Chevy Nova
   _____
   _____
   _____

10. Is anyone dependent on you for support?

Yes____ No____

If "yes", give names, ages, relationship to you, and the amount you contribute toward their support.

_____

_____

_____

_____

11. List any debts you have and the amount owed.

CREDITOR	AMOUNT OWED

12. List your monthly living expenses.

Utilities	**90.00**
Household Goods	**200.00**
Vehicle Upkeep	**150.00**
Medication	**75.00**

I certify under penalty of perjury that the above information is true and correct to the best of my knowledge.

/s/ Randy Eglin

(Signature of Applicant)